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No. 88-2044

In the Supreme Court of the United States

OCTOBER TERM, 1989

MISSOURI COALITION FOR THE ENVIRONMENT, ET AL., PETITIONERS

v.

CORPS OF ENGINEERS OF THE UNITED STATES ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the Army Corps of Engineers acted arbitrarily or capriciously by not preparing an Environmental Impact Statement in connection with its decision not to revoke a permit authorizing the filling of wetlands in St. Louis County, Missouri.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 866 F.2d 1025. The opinion of the district court (Pet. App. 18a-45a) is reported at 678 F. Supp. 790.

JURISDICTION

The opinion of the court of appeals was filed on January 27, 1989. A petition for rehearing was denied on March 17, 1989 (Pet. App. 82a). The petition for a writ of certiorari was filed on June 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 404 of the Federal Water Pollution Control Act, 33 U.S.C. 1344 (1982 and Supp. V 1987), authorizes the Corps of Engineers to issue permits for the discharge of dredged or fill material into the wetlands and the navigable waters of the United States. The Corps' regulations for evaluating permit applications are published at 33 C.F.R. 320.4. Those regulations require the Corps to assess "the public interest" by balancing favorable effects against any detrimental effects. 33 C.F.R. 320.4(a). Such a "public interest review" (*ibid.*) takes into consideration a number of factors, including environmental concerns and flood hazards. The Corps also has regulations concerning the modification, suspension, or revocation of Section 404 permits. See 33 C.F.R. 325.7. Those regulations authorize the Corps' district engineer to conduct informal proceedings (Pet. App. 26a) concerning whether an existing permit should be modified, suspended, or revoked.

2. In 1983, respondent Riverport Associates filed an application with the Corps for a permit to discharge fill material into a wetland to construct a levee on the bank of the Missouri River in St. Louis County, Missouri.[1] The levee was intended to provide flood protection for a tract of approximately 500 acres. Riverport Associates proposed to construct a retail, industrial, and commercial development – known as Riverport – on about 370 of those acres. Pet. App. 22a, 56a. Riverport Associates, after consultation with the Corps, submitted a proposal that would adversely affect four acres of wetlands. *Id.* at 57a-58a, 70a-71a. Riverside Associates also agreed that it would purchase a ten-acre parcel outside of the levee to create higher quality wetlands. *Id.* at 25a-26a.

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[1] The plan called for 800 feet of the levee to be made by the placement of fill upon wetlands. Pet. App. 57a.

In April 1985, the Corps published an Environmental Assessment (EA) concerning the permit application.[2] Pet. App. 56a-79a. An EA is used by the Corps in determining whether an Environmental Impact Statement (EIS) must be prepared under Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). Here, the EA considered, among other things, the following factors: (1) need for the proposed activity, (2) land-use classification, (3) flood hazards, (4) food production, (5) fish and wildlife, (6) endangered species, (7) water quality, (8) air quality, (9) wetlands, (10) recreation, (11) implications of the Wild and Scenic Rivers Act, 16 U.S.C. 1271 *et seq.*, (12) public health and safety, (13) navigation, (14) cultural resources, (15) erosion, (16) geological resources, (17) energy needs and conservation, (18) vegetation, (19) water supply, and (20) esthetics. The Corps concluded that its issuance of a Section 404 permit would "not have a significant effect on the quality of the human environment" and, therefore, that "the filing of an environmental impact statement [was] not required." Pet. App. 79a. The Corps then issued the Section 404 permit to allow construction of the levee. Pet. App. 25a.

3. Several months after the Corps issued the Section 404 permit, St. Louis County announced plans to construct a domed sports stadium in Riverport; the County hoped to secure the St. Louis professional football team as the primary tenant. Pet. App. 4a-6a, 26a. The County purchased 100 acres within Riverport in December 1985.[3]

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[2] An "Environmental Assessment" is defined by regulations issued by the Council on Environmental Quality as a concise public document prepared by a federal agency to provide "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. 1508.9(a)(1).

[3] The County also planned to use about 150 acres for additional stadium parking. Pet. App. 27a.

Id. at 26a. The Corps then began an informal process to consider whether, in light of the stadium proposal, it should modify, suspend, or revoke the Section 404 permit. Pet. App. 49a. During that process, the County informed the Corps that no additional wetlands areas would be filled as a result of the stadium proposal. *Id.* at 27a, 30a.

Many of the present petitioners then filed an action raising issues concerning the Corps' issuance of the Section 404 permit and the later proposal regarding the domed stadium. *Missouri Coalition for the Environment* v. *Corps of Engineers,* No. 86-2229-C(2) (E.D. Mo. filed June 25, 1986). Because the Corps had not decided whether to modify or revoke the Section 404 permit in light of the stadium proposal, however, the district court dismissed without prejudice that portion of the complaint concerning the stadium. Pet. App. 27a-28a. The balance of the action, which challenged the legality of the Corps' decision to issue the permit in the first place, was dismissed with prejudice as part of a settlement agreement.[4] *Id.* at 28a.

On June 22, 1987, following lengthy proceedings, the Corps issued a Memorandum For Record (MFR) that summarized the agency's reevaluation decision. Pet. App. 48a-55a. First, the Corps concluded that a new permit application was not required because "there will be no placement of fill in wetlands resulting from the construction of the revised project" (*id.* at 50a), and the substitution of the stadium for commercial, retail, and industrial uses within Riverport would not lead to a significant increase in the scope of the activities authorized by the existing permit. Second, the Corps stated that the environmental effects of the stadium proposal "would result in potentially signifi-

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[4] In connection with the settlement, Riverside Associates agreed to create 13 acres of new wetlands. In addition, the non-federal respondents paid $100,000 to the plaintiffs. Pet. App. 28a.

cant changes in only two of the twenty-eight environmental impacts addressed in the EA," namely economics and recreation. *Id.* at 51a. With regard to those two factors, the Corps found that the adverse effects "that are felt in some locations are mitigated to some extent by the beneficial economic and recreation impacts occurring in other locations." *Ibid.* The MFR also discussed: (a) alternative sites for the project, (b) highway access, (c) air quality, and (d) cumulative effects. *Id.* at 51a-55a. The Corps concluded that "the change of environmental impacts due to the revised project does not warrant modification, suspension or revocation of the Riverport permit." *Id.* at 51a. Accordingly, the Corps abided by its original decision not to prepare an EIS in connection with its issuance of the Section 404 permit.

4. Petitioners then filed this action in the district court alleging, among other things, that Section 102(2)(C) of NEPA required the Corps to prepare an EIS with respect to its reevaluation decision concerning the stadium proposal. Pet. App. 18a-19a. The district court, after hearing evidence explaining aspects of the Corps' decision, ruled: "Upon review of the reevaluation record and other relevant information here, it is not possible to find [that] the Corps acted in an arbitrary, capricious, or unreasonable manner in reaching its reevaluation decision." *Id.* at 35a. In the alternative, the district court, relying upon this Court's decision in *Heckler* v. *Chaney,* 470 U.S. 821 (1985), held that the Corps' decisions not to require a new permit application and not to modify, suspend, or revoke the original permit were not subject to judicial review. Pet. App. 38a.

5. The court of appeals affirmed. Pet. App. 1a-17a. The court ruled that the case was not rendered moot by the move of the St. Louis Cardinals professional football team to Phoenix, Arizona, because the County was con-

tinuing to try to interest a National Football League franchise to locate at the Riverport site. *Id.* at 6a-8a. The court then held that it could base its review of petitioners' claims upon the entire administrative record before the Corps, not just the MFR. *Id.* at 9a.

The court of appeals held that the Corps was not required to prepare an EIS. The court stated that petitioners had failed to carry their burden of demonstrating "that there were facts omitted from the administrative record which, if true, would show that the permitted project could have a substantial impact on the environment." Pet. App. 12a-13a. Alternatively, the court of appeals "agree[d] with the district court that a decision not to modify, suspend or revoke a Section 404 permit is one committed to the Corps' absolute discretion and, as such, it is not reviewable under the Administrative Procedures Act, 5 U.S.C. § 701(a)(1) [and] (2)." Pet. App. 12a n.10.

Judge Fagg dissented. He believed that the case was moot because the St. Louis Cardinal football team had moved to Phoenix and there was no indication that any other prospective "anchor tenant" was interested in the Riverport site. Pet. App. 16a-17a.

ARGUMENT

The court of appeals properly upheld the Corps' decision, and this case raises no dispositive issue of general importance. Thus, no further review is warranted.

1. The standard of review governing this case is now settled. Under the Administrative Procedure Act, 5 U.S.C. 706(2)(A), a reviewing court may not set aside an agency's decision to forgo preparation of an EIS unless the agency action is "arbitrary [or] capricious." *Marsh* v. *Oregon Natural Resources Council,* 109 S. Ct. 1851, 1860 (1989). See also *Wisconsin* v. *Weinberger,* 745 F.2d 412,

418 (7th Cir. 1984); *Webb* v. *Gorsuch*, 699 F.2d 157, 159 (4th Cir. 1983). In applying the "arbitrary or capricious" standard, a court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). The court must give appropriate deference to matters within an agency's expertise. See *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 103 (1983). And "[a]bsent a showing of arbitrary action, [courts] must assume that the agencies have exercised this discretion appropriately." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976).

Under the "arbitrary or capricious" standard, the courts have a particularly circumscribed role in reviewing an agency's decision not to alter its original analysis under NEPA in light of new information. As the Seventh Circuit observed in *Wisconsin* v. *Weinberger*, 745 F.2d at 418 (emphasis in original):

> an agency cannot have acted arbitrarily or capriciously in deciding not to file a [supplemental EIS] unless the new information provides a *seriously* different picture of the environmental landscape such that another hard look is necessary.

See also *Marsh*, 109 S. Ct. at 1865 (Court upheld action where "Corps conducted a reasoned evaluation of the relevant [new] information").

2. In this case, the Corps did not act arbitrarily or capriciously in deciding that St. Louis County's proposal to build a stadium on Riverport did not require the Corps to withdraw the Section 404 permit and prepare an EIS. The record shows (Pet. App. 14a), and petitioners do not dispute, that the Corps considered all of petitioners' complaints about the environmental effects of the proposed

stadium. The Corps requested a great deal of information from St. Louis County. *Id.* at 29a. The Corps received comments from every federal, state, and local agency with any interest in Riverport. *Id.* at 4a. And the Corps reviewed detailed submissions from petitioners, including 22 depositions and thousands of documents. *Id.* at 29a. The Corps' decision-making process took more than 16 months, and generated a 66-pound administrative record. *Ibid.* Indeed, the Corps conducted the most comprehensive reevaluation in the Corps' Kansas City District in the last ten years. *Id.* at 4a.

The Corps carefully considered every possible relevant factor. For example, the Corps asked the Missouri Highway and Traffic Commission to review the parking situation; the Commission found that the proposed plan was adequate. Pet. App. 32a. The Corps consulted with the Environmental Protection Agency regarding air pollution from stadium traffic; that agency informed the Corps that the proposal would not violate federal laws or regulations. *Id.* at 33a. And the Corps was careful in ensuring that drainage from the parking lots would not adversely affect any wetlands. Gov't C.A. Br. 34-35.

The Corps summarized its conclusions in the MFR. The Corps referred to the EA, which petitioners agree (see Pet. App. 10a) validly considered the environmental effects of the original Riverport proposal. The Corps stated: "The revised project would result in potentially significant changes in only two of the twenty-eight environmental impacts addressed in the EA. Those impacts are economics and recreation." *Id.* at 51a. The Corps then found that "[t]he adverse economic and recreation impacts that are felt in some locations are mitigated to some extent by beneficial economic and recreation[al] impacts occurring in other locations." *Ibid.* Accordingly, the Corps adhered to its finding in the EA that the Section 404 permit "will

not have a significant effect on the quality of the human environment." Pet. App. 79a. Petitioners do not explain how the district court erred in concluding that "it is not possible to find [that] the Corps acted in an arbitrary, capricious, or unreasonable manner in reaching its re-evaluation decision." *Id.* at 35a.

3. Petitioners argue (Pet. 7-18) that the court of appeals erred in not requiring the Corps to give a reasoned explanation for its decision. We do not read the court's opinion as expressing that view. Rather, it appears that the court of appeals understood petitioners' claim to be that the Corps failed to consider relevant environmental factors. Accordingly, the court reviewed the record before the Corps and found that it had considered every significant factor. See Pet. App. 14a. Contrary to petitioners' suggestion (Pet. 7), the court never ruled that an agency need not express the reasons why it concluded not to prepare an EIS.[5]

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[5] The other Eighth Circuit cases that petitioners cite (Pet. 18) also do not hold that an agency need not explain its decision not to prepare an EIS. In those cases, the plaintiff was contending that an agency had neglected to consider some particular aspect of the project at issue. For example, in *Winnebago Tribe* v. *Ray*, 621 F.2d 269, 271, cert. denied, 449 U.S. 836 (1980), which involved a permit for a power line over navigable waters, the plaintiff asserted that the agency's consideration ignored those portions of the power line that did not cross navigable waters. Similarly, in *Olmsted Citizens for a Better Community* v. *United States*, 793 F.2d 201 (1986), the plaintiffs alleged that the agency had failed to consider the socioeconomic impacts of a proposed prison hospital. And in *Ringsred* v. *City of Duluth*, 828 F.2d 1305, 1307 (1987), the plaintiff asserted that "the Environmental Assessment was deficient in that it failed to consider the environmental impact of and alternatives to the proposed parking ramp construction." Accordingly, the court of appeals in those cases merely responded to the claims raised by the plaintiffs.

Nor can there be any doubt that the Corps adequately explained the rationale for its decision. As we noted above, the Corps prepared an EA regarding the original permit application when the applicant proposed to develop the Riverport tract for nonspecific retail, commercial, and industrial purposes. Petitioners have conceded the validity of the Corps' original findings and conclusions in the EA. And when the Corps reevaluated its permit decision, it relied on many aspects of the original EA,[6] as well as its conclusions summarized in the MFR. Petitioners have not explained why any further explanation was required for a reviewing court to understand the Corps' reasoning.

Moreover, in light of the Court's recent decision in *Marsh* v. *Oregon Natural Resources Council, supra,* there plainly is no reason to grant review of the question that petitioners present. The Court in *Marsh* decided the proper standard for reviewing an agency's decision not to issue an EIS—*i.e.,* whether that decision was arbitrary or capricious.[7] And that standard implies that the agency must give a reason for its decision so that the reviewing court may decide whether the decision was arbitrary. See *Marsh,* 109 S. Ct. at 1861; *Vermont Yankee Nuclear*

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[6] The proposed stadium in Riverport did not call for the filling of any additional wetlands. Thus, most of the Corps' analysis in the original EA remained applicable to its consideration of the stadium proposal. For example, the Corps stated in the EA that the development of the Riverport tract would take certain agricultural lands out of production. Pet. App. 62a-64a. That would remain true whether or not the Riverport lands were devoted to a stadium or any other development.

[7] Before *Marsh,* the Eighth Circuit used the "reasonableness" standard for reviewing an agency determination that no EIS was required. See *Monarch Chemical Works, Inc.* v. *Thone,* 604 F.2d 1083, 1087 (1979).

Power Corp. v. *NRDC*, 435 U.S. 519, 549 (1978). Thus, there is now no doubt in the Eighth Circuit or anywhere else that an agency must explain its decision so that the reviewing court may find that the agency based its decision "on a reasoned evaluation 'of the relevant factors.' " 109 S. Ct. at 1861. This case therefore presents no issue warranting further review.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8] In any event, petitioners do not challenge the alternative holding of the court of appeals—*i.e.*, that the Corps' decision not to suspend, modify, or revoke the permit was not subject to judicial review. Pet. App. 12a n.10.

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